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IN THE
COURT OF APPEALS OF INDIANA

EDWARD SCHNUCKNECHT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0610-CR-448
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas Stefaniak, Jr., Judge
Cause No. 45G04-0511-FA-56

May 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Edward Schnucknecht[1] appeals his sentence imposed following his guilty plea to class B felony dealing in cocaine[2] and class D felony maintaining a common nuisance.[3] We affirm.

Issue

Schnucknecht raises one issue on appeal, which we restate as whether the trial court erred in sentencing him.

Facts and Procedural History

On or about November 17, 2005, Lake County officers executed a search warrant on Schnucknecht's place of business. One bag of cocaine weighing 29.2 grams was found on Schnucknecht and seven more bags of cocaine weighing a total of 77.6 grams were found on the premises. Appellant's App. at 8. On November 19, 2005, the State charged Schnucknecht with seven counts: one count of class A felony dealing in cocaine; three

[1] Appellant's name often appears as "Schucknecht" in the captions of the documents at the trial court level. On appeal, the parties identify the appellant as "Schnucknecht" in their captions, while within appellant's brief, his name sometimes appears in its other version. For consistency at the appellate level, we spell appellant's name as it appears on the parties' captions on appeal.

[2] According to the abstract of judgment, Schnucknecht was convicted of class B felony "Dealing in Cocaine" pursuant to Indiana Code Section 35-48-4-2(a)(1)(C). Appellant's App. at 34. We note, however, that "Dealing in Cocaine" is governed by Indiana Code Section 35-48-4-1. The statute cited in the abstract of judgment, Indiana Code Section 35-48-4-2, governs "Dealing in a schedule I, II, or II, controlled substance." The two statutes are substantially similar. However, pursuant to Section 35-48-4-1(b)(1), where the amount of the drug involved weighs three (3) grams or more, the offense is a Class A felony, but this particular circumstance is omitted from Section 35-48-4-2(b). Originally, Schnucknecht's charges included class A felony dealing in cocaine based on his possession of more than three grams of cocaine. Appellant's App. at 8. Yet, the information cites Indiana Code Section 35-48-4-2(a)(2)(C)(b)(1), when the correct cite would have been 35-48-4-1(a)(2)(C)(b)(1). This charge was dismissed, but it indicates that perhaps the citation to the statute was incorrect. In any event, we are able to consider the sentencing issued raised by Schnucknecht because he appeals a sentence for class B felony dealing.

[3] Ind. Code § 35-48-4-13(b)(2)(D).

counts of class B felony dealing in cocaine; one count of class B felony dealing in a controlled substance; one count of class C felony dealing in a controlled substance; and one count of class D felony maintaining a common nuisance. *Id*. at 10-13. On June 6, 2006, Schnucknecht entered a plea agreement in which he pled guilty to class B felony dealing in cocaine and class D felony maintaining a common nuisance. *Id*. at 25-7. The plea agreement permitted the parties to argue sentencing within the range of ten to twenty years' imprisonment for dealing cocaine[4] and within the range of six months to three years' imprisonment for maintaining a common nuisance.[5] The State agreed to dismiss the remaining charges at the time of sentencing.

At the sentencing hearing on August 29, 2006, the State asked the trial court to sentence Schnucknecht to thirteen years for dealing cocaine and two years for maintaining a common nuisance, to be served consecutively. *Id*. at 65-6. The trial court found that Schnucknecht's guilty plea and his lack of a prior criminal history were mitigating factors and that the total amount of cocaine in Schnucknecht's possession was an aggravating factor. *Id*. at 68-9. The trial court found that the aggravating factor outweighed the mitigating factors and sentenced Schnucknecht to twelve years' imprisonment for class B felony cocaine dealing and twenty months for class D felony maintaining a common nuisance, to be

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[4] "A person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years." Ind. Code § 35-50-2-5.

[5] "A person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years." Ind. Code § 35-50-2-7(a).

served concurrently. Schnucknecht appeals.

Discussion and Decision

Schnucknecht claims that the trial court erred in concluding that the aggravating factor outweighed the mitigating factors and imposing a sentence greater than the advisory sentence. As we review Schnucknecht's claim, we note that our legislature has replaced our "presumptive" sentencing scheme with an "advisory" sentencing scheme, and a split in this Court has developed as to the manner in which appellate review should be conducted under the new sentencing scheme and whether trial courts must continue issuing sentencing statements justifying the imposition of any sentence other than the advisory sentence. *Compare McMahon v. State*, 856 N.E.2d 743, 749 (Ind. Ct. App. 2006) (holding that trial courts are required to issue sentencing statements to support any deviation from advisory sentence), *with Fuller v. State*, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006) (holding that trial courts are under no obligation to find, consider, or weigh either aggravating or mitigating circumstances), *trans. denied*. Thus, we currently await direction from our supreme court.

Nevertheless, this Court is in agreement that sentencing statements provide meaningful assistance to our exercise of power under Indiana Appellate Rule 7(B) to revise a sentence that is inappropriate in light of the nature of the offense and the character of the offender. *Gibson v. State*, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). Appellate Rule 7(B) authorizes independent appellate review and revision of a sentence imposed by the trial court. *Childress v. State*, 848 N.E.2d 1073, 1079-80 (Ind. 2006). Indiana Code Section 35-38-1-3 provides,

> Before sentencing a person for a felony, the court must conduct a

> hearing to consider the facts and circumstances relevant to sentencing. The person is entitled to subpoena and call witnesses and to present information in his own behalf. The court shall make a record of the hearing, including:
> (1) a transcript of the hearing;
> (2) a copy of the presentence report; and
> (3) if the court finds aggravating circumstances or mitigating circumstances, a statement of the court's reasons for selecting the sentence that it imposes.

We are not limited to a written sentencing statement but may consider the trial court's comments in the transcript of the sentencing hearing. *Corbett v. State*, 764 N.E.2d 622, 631 (Ind. 2002). Additionally, a trial court may impose any sentence that is authorized by statute and permissible under the Constitution of the State of Indiana regardless of the presence or absence of aggravating circumstances or mitigating circumstances. Ind. Code § 35-38-1-7.1(d).

Here, the trial court provided an oral sentencing statement that will serve as "an initial guide" to determining whether Schnucknecht's sentence is inappropriate. *See id.* ("We will assess the trial court's recognition or nonrecognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed here was inappropriate."). The sentencing statement is part of our analysis, but it does not limit the matters we may consider. *Gibson*, 856 N.E.2d at 149; *see also McMahon*, 856 N.E.2d at 750 (noting that inappropriateness review should not be limited to the list of aggravating and mitigating factors found by the trial court).

Schnucknecht concedes that the large amount of cocaine is an aggravating factor that

is supported by the record.[6] Appellant's App. at 6. However, he argues that the trial court failed to give his lack of criminal history the substantial mitigating weight it deserved. The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. *Gross v. State*, 769 N.E.2d 1136, 1140 (Ind. 2002). "Nor is the court required to give the same weight to proffered mitigating factors as the defendant does." *Id*. The Indiana Supreme Court has held that a criminal history consisting of no prior felony convictions, one prior misdemeanor marijuana possession conviction and several traffic infractions, most of which had been dismissed, was "not a criminal history that supports a significant aggravating factor" or a factor amounting to "significant mitigating weight." *Robinson v. State*, 775 N.E.2d 316, 321 (Ind. 2002); *see also Bunch v. State*, 697 N.E.2d 1255, 1258 (Ind. 1998) (trial court considered defendant's lack of prior criminal history, but properly declined to accord it significant weight). "A trial court may properly conclude that a defendant's lack of a criminal record is not entitled to mitigating weight." *Sipple v. State*, 788 N.E.2d 473, 483 (Ind. Ct. App. 2003), *trans. denied*. Here, Schnucknecht's lack of criminal history is not necessarily entitled to significant mitigating weight.

Schnucknecht makes the same argument regarding the weight the trial court gave to

[6] In his reply brief, Schnucknecht argues for the first time that the amount of cocaine found in his possession is a necessary element of the dealing offense, which does not set his offense apart from the factors generally associated with the crime. Appellant's Reply Br. at 1-2. We decline to respond to this new argument because the purpose of a reply brief is to respond to appellee's arguments and not to raise new issues. *See* Ind. Appellate Rule 46(C) ("No new issues shall be raised in the reply brief."); *State v. Hanley*, 802 N.E.2d 956, 958 n.9 (Ind. Ct. App. 2004) ("[I]t is axiomatic that a party may not raise new issues in its reply brief."), *trans. denied*. Nevertheless, because Schnucknecht pled guilty to dealing as a class B felony, his argument is without merit. Had he been convicted of dealing as a class A felony based on his possession of more than three grams of cocaine pursuant to Indiana Code Section 35-48-4-1(b)(1), then the amount of cocaine would not have been an appropriate aggravator. *See Smith v. State*, 780 N.E.2d 1214, 1219 (Ind. Ct. App. 2003) (holding that the trial court could not use the fact that the defendant had eighty-five grams of cocaine as an aggravator because he was convicted of dealing three or

his guilty plea and acceptance of responsibility. The trial court is not obligated to give a plea of guilty significant mitigating weight where the defendant receives a substantial benefit in exchange for pleading guilty. *Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), *trans. denied*; *see also Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999). Here, in exchange for his guilty plea to one class B felony and one class D felony, the State dismissed a class A felony, three class B felonies, and a class C felony. Schnucknecht received a substantial benefit in exchange for his guilty plea such that it does not constitute a significant mitigating factor.

Focusing now more generally on the issue of inappropriateness, we note that as to Schnucknecht's character, he was fifty-one years old at the time of sentencing with no criminal history. However, he was certainly old enough to know better than to support himself by dealing cocaine. By his own admittance, he "was in a hole" and was selling drugs because it was "the only thing I could think of, sir, to try to get out of it." Appellant's App. at 55.

As to the nature of the offenses, Schnucknecht had over 100 grams of cocaine in his possession. The trial court sentenced Schnucknecht's to an aggregate sentence of twelve years, well below the maximum of twenty-three years provided by the plea agreement.[7] Given the substantial amount of cocaine, a twelve-year sentence is not inappropriate. In sum, we find no error in the trial court's sentencing.

Affirmed.

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more grams), *trans. denied*.

[7] Schnucknecht's sentence is also less than the fifteen-year sentence the State requested.

BAKER, C. J., and FRIEDLANDER, J., concur.